Supreme Court, U.S.
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No. 09-1494

In The
Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE
and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. BY THE CITY'S STIPULATIONS AND THE UNCONTESTED EVIDENCE, THE ARTWORK IS EXPRESSIVE AND THE ORDINANCE BANS ITS PUBLIC DISPLAY.

This Court has not directly articulated the proper First Amendment analysis for restrictions, allegedly motivated by non-speech concerns, on public display of visual art. The absence of guidance has led to a circuit split.

The City of San Marcos does not defend the Fifth Circuit's primary holding: that while the First Amendment may protect "great works of art," it is not applicable in "every case involving visual non-speech expression."

The City *does* defend the Fifth Circuit's alternative rationale under a flawed First Amendment analysis. Therefore, even the City acknowledges that this case squarely presents the second Question Presented:

> May a city wholly ban the public display of an entire category of art, leaving enclosed, private display as the only available option?

It is uncontested that the artwork at issue is expressive. It is also uncontested that the City's ordinance enacts a citywide ban of public display of any artwork incorporating a junked vehicle. These uncontested facts therefore present an important question for this Court to resolve – is the display of

art, visible to the public passing on streets and sidewalks, subject only to "time, place and manner" restrictions, or may it be entirely banned from the public arena if a city claims a generalized "health and safety" concern purportedly unrelated to the suppression of speech?

A. The Artwork is Expressive.

Respondent refutes its own stipulations and argues with uncontested evidence in its effort to claim the artwork is not primarily expressive but is, instead, "functional" and therefore entitled to no or lesser First Amendment protection.

Respondent claims that Petitioner Kleinman's "true underlying intent and purpose" was commercial, not artistic. Resp. at 12, 15. This assertion lacks any record citation, for good reason. There is no evidence or finding that the Petitioners' intent was commercial. Respondent *stipulated* that "Kleinman had always intended to turn the donated vehicle into an artwork planter," and that each artist intended his artwork to convey ideas about transforming a polluting object into a life-giving thing of beauty. App. 62-63.

Nor, contrary to Respondent's claim (again without citation), did the District Court "make the specific finding that artistic expression was not the dominant element" of the work. Resp. at 10. Rather, the District Court saw "both expressive and functional elements," App. 28, in that the work conveyed the artists' meaning while also, the District Court believed, being "closely associated with Planet K." App. 29.

The artwork carries no advertisement for Planet K, and the artists were free to create their own work. App. 65-66. But, significantly, even the "function" seen by the District Court was itself *expressive*: the District Court concluded that the artwork had become "a distinctive symbol of the Planet K business." App. 28. Symbolism is expression entitled to First Amendment protection. *E.g.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (black armbands symbolic protest of Vietnam conflict).

The District Court properly rejected Respondent's assertion that the artwork was "commercial speech," App. 28, as well as Respondent's argument that the artwork "is outside the scope of First Amendment protection, or that it is subject to less than intermediate scrutiny." App. 29. The statue of Atlas at Rockefeller Center is no less artistic or expressive because it is also associated with NBC, the center's primary tenant.

Respondent also argues with the uncontested facts by repeatedly, and wrongly, claiming that the artwork here poses the same health and safety concerns as any junked vehicle. *E.g.*, Resp. at 10. In fact, the gasoline and oil were drained, the glass removed, the doors welded shut, the hood and trunk removed, and the interior filled with dirt and cacti, making it impossible for children to get locked inside or use the car as a "fort." App. 60. This matters. When a government attempts to apply even a facially-neutral regulation in a way that restricts expression, whether

the particular expression poses the dangers that the government has an interest in regulating is considered. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 410 (1989) (conviction of peaceful protestor for burning American flag violates First Amendment because "the State's interest in maintaining order is not implicated on these facts").

Respondent misses this point in offering a "parade of horribles" argument that ruling in Petitioners' favor would require the City to allow a citizen to strew garbage in his front yard in protest of solid waste policies. Resp. at 9. The proper analogy would be the transformative use of material typically considered "garbage" in a piece of expressive art that poses none of the dangers that justify governmental regulation; such an art piece, like Petitioners' artwork, would be constitutionally protected.

B. The Ordinance Enacts a Citywide Ban on Public Displays of Art.

Respondent's focus on the artwork's location and its purported association with Planet K is designed to draw attention from the ordinance's citywide ban on an entire medium of artwork.

The ordinance bans the public display of Petitioners' artwork *anywhere* in San Marcos. Petitioners cannot legally move their work to a private residence, to a sculpture garden, or even to a museum with windows, if it can be seen from any sidewalk, street, or right-of-way. Car art cannot be displayed in traditional public forums for free expression such as parks

or sidewalks. *Boos v. Barry*, 485 U.S. 312, 318 (1988). "In such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Id.* (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). The artwork's location near the Planet K store was therefore immaterial to the First Amendment injury imposed by the Respondent's citywide ban.

Similarly, any purported association between this artwork and Planet K is immaterial. *Any* artwork made from a "wrecked, dismantled, partially dismantled or discarded" vehicle (or its parts) is banned. Remove the association between this artwork and Planet K, and the ordinance *still* bans any public display.

Outright bans on a medium of speech are heavily disfavored:

> Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.

City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

Respondent simply ignores the amicus briefs filed in support of Petitioners. These artists, art museums, and art associations all recognize that the ordinance enacts a wholesale prohibition against

public displays of even "pure" art – whatever that might be – made using an idiosyncratic, but well-recognized, artistic medium. Brief of Amici Curiae Texas Civil Rights Project, *et al.*, at 23; Brief of Amici Curiae Texas Accountants and Lawyers for the Arts, *et al.*, at 16.

II. THE CITY CANNOT REFRAME THE QUESTION TO AVOID THE FIRST AMENDMENT.

Respondent does not try to defend the proposition that only "great works of art" receive First Amendment protection, but rather denies that the Fifth Circuit made such a holding. Resp. at 3. But it did so hold, as shown both by the language of its opinion and the grave concerns about the ruling expressed by the artists and art groups who filed amicus briefs.

A. The Fifth Circuit's Ruling.

The Fifth Circuit, claiming a lack of guidance due to "the law's vagueness," declared that the category of material entitled to First Amendment protection "is not so unbounded" as to encompass all visual art. App. 6. The Circuit Court distinguished *Hurley v. Irish-American GLB Group of Boston*, 512 U.S. 557 (1995), because it "refers solely to great works of art" and declared that "[n]either in *Hurley* nor in any later case has the [Supreme] Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." App. 7. The Court then concluded that the artwork – which

it gratuitously characterized as "a three-dimensional advertisement for a novelty shop" -- was entitled to no First Amendment protection at all. App. 9.

The Fifth Circuit purported to "share the *Mastrovincenzo* court's skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression." App. 9. But the Second Circuit in *Mastrovincenzo* did not reject constitutional analysis. That Court held that the plaintiff's goods – decorated baseball caps and t-shirts – "serve a predominantly expressive purpose, and their sale is consequently protected under the First Amendment." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2nd Cir. 2006). It upheld the city's denial of a vendor's permit only *after* determining that application of the permitting ordinance to the plaintiff satisfied intermediate scrutiny under *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by leaving open adequate alternative channels of public communication, including "reaching public audiences on the sidewalks" by "personally distributing their art to the public free of charge" or "enlist[ing] licensed vendors to sell their clothing." 435 F.3d at 101.

B. Respondent's Argument.

Respondent takes a different tack to avoid constitutional scrutiny, arguing that if an ordinance is not written with the intent to regulate speech, then any "reasonable" government purpose upholds

the ordinance, regardless of its impact on speech. Resp. at 4-10.

The City displays a fundamental misunderstanding of important free speech principles. For example, the City suggests without explanation that the free-exercise case of *Employment Div. v. Smith* is somehow relevant (Resp. at 7); that *Smith*'s "rational basis" test is the same as the *O'Brien* test for expressive conduct (*id.*); and that *O'Brien*'s analysis is not a "First Amendment test[ ] . . . in the traditional sense" (Resp. at 10). All of these assertions are wrong. *Smith* itself notes that application of its standard to a free speech case would be incorrect. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990). *O'Brien* applied a First Amendment intermediate scrutiny test requiring a substantial governmental interest and a narrowly tailored regulation (unlike *Smith*). *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Because the Petitioner's artwork is expressive and has no "function" other than expression, and because the City's ordinance dictates where that expression may be displayed, the appropriate test is the "time, place, and manner" analysis of *Clark* and *Ward*, including the requirement that the City leave open ample alternative channels of communication. Even if the public display of artwork is considered "expressive conduct" and *O'Brien* applies, the ordinance is not narrowly tailored and thus fails under that test as well.

III. THE CITY CANNOT WISH AWAY THE CONFLICT WITH THIS COURT'S DECISIONS AND THE SUBSTANTIAL CIRCUIT SPLIT CAUSED BY THE FIFTH CIRCUIT'S DECISION.

A. Conflict with this Court's Precedent.

Respondent argues that *Hurley* and *Bery* are distinguishable because they "involved laws aimed at regulating areas of expression," unlike the junked vehicle ordinance here. Resp. at 10. They did not. *Hurley* involved a state law outlawing discrimination in public accommodations, and *Bery* involved a generally-applicable municipal vendor permitting ordinance. *Hurley*, 515 U.S. at 561; *Bery v. City of New York*, 97 F.3d 689, 692 (2nd Cir. 1996). Neither of those regulations had the purpose of regulating expression; they only regulated conduct, yet they were subjected to "as applied" challenges when they burdened expression. *Hurley*, 515 U.S. at 572; *Bery*, 97 F.3d at 697.

Respondent cites no case from any court authorizing a total ban on public display of artistic expression using a particular medium. Indeed, "[b]ecause time, place and manner regulations must 'leave open ample alternative channels for communication of information,' a total ban would necessarily fail [intermediate scrutiny]." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 321 (2000) (Opinion of O'Connor, J.) (quoting *Ward*, 491 U.S. at 791).

"[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'" *City of Ladue*, 512 U.S. at 56. Respondent cites no case from any court holding that this standard can be met without providing any right to speak publicly. This Court's case law is to the contrary. For example, in *Frisby v. Schultz*, 487 U.S. 474, 483-84 (1988), a prohibition against picketing in front of a residence was saved only by a construction of the ordinance that permitted "[m]arching through residential neighborhoods, or even walking a route in front of an entire block of houses," therefore leaving the required "ample alternative" methods of speaking publicly.

Finally, Respondent ignores the significant fact that the Petitioners' artwork was displayed wholly on private property, where this Court has held that a private citizen's interest in expression is stronger and the government's interest in regulating is weaker. As this Court noted when invalidating the application of a municipal ordinance to a sign on private property,

> [d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the

> same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

City of Ladue, 512 U.S. at 56-57. While the government must "mediate among various competing uses" for public streets and facilities, its need to regulate speech from private property "is surely less pressing." *Id.* at 58.

B. Circuit Conflict.

Respondent ignores the Fifth Circuit opinion's conflict with the Ninth Circuit's 2009 *en banc* decision in *Berger v. City of Seattle* and its multiple opinions debating whether *sixteen* locations in a public park provided the ample alternative channels of communication required by this Court's holdings in *Ward* and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *Berger*, 569 F.3d 1029, 1076, 1088 (9th Cir. 2009). Respondent's ordinance – which leaves no public forum whatsoever available for Petitioners' expression – would fail *any* of those opinions' standards, majority and dissents.

Respondent's only effort to distinguish the Second Circuit's *Bery* decision is the incorrect claim that the generally-applicable New York City vendor ordinance was "aimed at regulating areas of expression," when it was clearly directed at regulating the sale of

goods on public sidewalks, and incidentally limited the sale of expressive merchandise.

Respondent's claim that Petitioners have an adequate alternative channel of communication due to their "right" to "leave the vehicle on-site but to shield it from view or invite individuals into an enclosed structure" (Resp. at 15) directly conflicts with *Bery*'s holding that the alternative channel of communication standard requires access to a *public* audience. *Bery*, 97 F.3d at 698 ("[T]o tell appellants that they are free to sell their work in galleries is no remedy for them.").

Respondent relies heavily on *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977), decided before *Clark* and *Ward* made clear that content-neutral regulations must leave open ample alternative channels of communications. Respondent argues that the junked car in *Davis* was "political expression" that is more highly valued than "artistic expression." Resp. at 8. But *Davis* involved no "expression" other than the vehicle owner's subjective assignment of meaning to wreck. There was no stipulation that the wreck in *Davis* conveyed *any* meaning, let alone artistic meaning. The unaltered wreck in *Davis* also posed health and safety dangers not present in this case.

Respondent's *Davis* argument is doubly questionable: Respondent cites no authority suggesting that artistic expression enjoys less protection than political expression, and the work at issue here *was*

both "artistic" and "political." It bears the words "make love not war" around the gas cap and conveys the creators' ideas about pollution, environmental degradation and dependence upon foreign oil – and the City stipulated that for each creator, the use of the junked vehicle was "integral to his expression." App. 61-62. Even if *Davis* were correct, it merely emphasizes the conflict between this case, *Davis*, *Bery* and *Berger*.

IV. THE ARTISTS HAVE FIRST AMENDMENT STANDING.

Respondent argues, for the first time, that artists Scott Wade and John Travis lack standing because they "do not own or have a legal interest" in the artwork. Resp. at 16. This is factually and legally incorrect.

Although Michael Kleinman owns the object on which their works were painted, the artists own the copyright to their respective contributions. App. 61; 17 U.S.C. § 201(a), (c); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (commissioned sculpture is not "work for hire" and thus artist retains copyright in work). The City's ban on public display of their artwork therefore directly injures their rights as copyright holders. *See* 17 U.S.C. § 106 (listing copyright owner's exclusive rights).

Moreover, the Court relaxes standing requirements in freedom of speech cases because "application of those rules would have an intolerable, inhibitory

effect on freedom of speech." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972).[1]

Wade and Travis therefore have standing.[2]

CONCLUSION

This Court should grant review to clarify the First Amendment standards applicable to public display of visual art, and hold that Respondent's city-wide ban of a medium of expression is unconstitutional.

Respectfully submitted,

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[1] In *United States v. Raines*, 362 U.S. 17 (1960), cited by Respondent, this Court noted that the very principle cited by Respondents – that "a litigant may only assert his own constitutional rights or immunities" – does not apply "where the application of these rules would itself have an inhibitory effect on freedom of speech." *Raines*, 362 U.S. at 22.

[2] As Petitioner Kleinman unquestionably has standing, this question does not impact this Court's jurisdiction.